BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

LEGAL POINTS AND AUTHORITIES

POINT I.

In Kentucky a Trespass is Presumed to have been Willful Unless and Until Proven by Substantial and Satisfying Evidence to have been Otherwise; and the Burden of Such Proof Rests Upon the Trespasser.

An early leading Federal case on this point is *Liberty Bell Gold Mining Co.* v. *Smuggler-Union Mining Co.*, 203 F. 795, 122 C. C. A. 113, which *holds*:

> "Intent, being a state of the mind, can but seldom be proven by direct evidence. For this reason the law presumes that a party intended the natural consequence of his acts, and if a person *has the means of ascertaining facts,* but *refuses to use these means,* and, *reckless of the rights of the true owner,* appropriates his property to his own use, the law will *presume* that he did it *intentionally* and *willfully.*"

In *Elkhorn-Hazard Coal Co.* v. *Kentucky River Coal Corporation,* 20 F. (2d) 67, C. C. A. 6th Ct., the court, speaking through the late Judge *Westenhaver,* then District Judge, has this to *say*:

> "The Court below was right in holding the trespass was not innocent or inadvertent or unintentional. If the trespass is wrongful, nothing else appearing, it will be presumed to be willful. The duty is cast upon the trespasser to explain his conduct and to show it was inadvertent or unintentional or under a *bona fide* belief of right. See Resurrection Gold Mining Co. v. Fortune Gold Mining Co. (8 C. C. A.) 129 F. 668, 669; Liberty Bell Gold Mining Co. v. Smuggler-Union Mining Co. (8. C. C. A.) 203 F. 795-802, etc."

A leading case of the Court of Appeals of Kentucky on this question is *Griffith et al.* v. *Clark Mfg. Co. et al.*, 279 S. W. 971, 212 Ky. 498, where the Court *says*:

> "One is presumed to have intended the reasonable and natural consequences of his acts, and his denial of such an intention is not conclusive, if the act was done *recklessly* OR *wantonly*, or under circumstances warranting a different conclusion."

In Kentucky Harlan Coal Co. v. *Harlan Gas Coal Co.*, 245 Ky. 234, 53 S. W. (2d) 538, 542, in the first paragraph of section 10-12 of the opinion, the Court of Appeals of Kentucky, speaking through *Richardson*, Judge, has this to *say*:

> "To bring himself within the rule controlling a claim against a trespasser for damage committed by him by an 'innocent mistake', as this term is applied in such cases, the trespasser *must allege and prove such facts* as will *show his acts were not* 'willful and knowingly committed', or not 'intentional'."

(This *Kentucky Harlan* and other cases on this point will be found cited and applied to the facts of the case in suit in petitioner's Petition for Rehearing of the cause by the Circuit Court of Appeals, Tr. Vol. III, from near bot. of p. 130 to mid. of p. 140).

The holding in *Kentucky Harlan* v. *Harlan Gas* remains the settled law in Kentucky on this valuable *substantive right* of Petitioner. Cf. *Cities Service Oil Co.* v. *Dunlap*, 304 U. S. 202; *Ruhlin* v. *N. Y. Life Ins. Co.*, 304 U. S. 261; *Hudson* v. *Moonier*, 304 U. S. 397; *Wichita Royalty Co.* v. *City Nat'l. Bank*, 306 U. S. 193, cited in the Petition for Rehearing of this cause, Tr. Vol. III, p. 136.

POINT II.

In Kentucky The Measure of Damages for the Willful Conversion of the Coal of Another is the Market Value of the Coal After Conversion, or the Price at which Sold by the Trespasser.

So thoroughly is this proposition established in the State of Kentucky and in our jurisprudence generally that we shall cite but a few of the myriad cases that record and expound it, selecting from the great horde of decided cases those in which the facts are most nearly similar or analogous to the facts in suit.

Liberty Bell Gold Mining Co. v. *Smuggler-Union Mining Co.*, 203 Fed. 795, C. C. A. 8th Ct., is a case in which the facts are a well-nigh perfect paraphrase of certain facts in the instant case. The plaintiff and defendant had certain negotiations for an exchange of ore-bearing lands during which the president of the defendant company attempted to work out with the president of the plaintiff company an exchange for the land trespassed upon without divulging to the president of the plaintiff company the fact that the trespass has been under way for about two years. In this connection defendant's president had shown plaintiff's president a map of defendant's mine development, but the map failed to disclose any or all of the pertinent facts. Somewhat later defendant's president did tell plaintiff's president that they were near his line but made no intimation whatever that actual mining of plaintiff's land was under way.

Syllabus 1 of the *Liberty Bell* opinion *holds*:

> "*Syl. 1.* In an action to recover damages for a wilful and intentional trespass to mining property by removing and converting ore therefrom, it was not error for the court to instruct that the higher

measure of damages should be allowed if the jury found that the ore was '*recklessly*' taken, since if defendant, *with the means of ascertaining that it was the property of plaintiff refused to use such means,* and in reckless disregard of the rights of the true owner appropriated it, *the law will presume that it was done intentionally and wilfully.*"

In *Resurrection Gold Mining Co.* v. *Fortune Gold Mining Co.*, 129 Fed. 668 C. C. A. 8th Ct., *Judge Sanborn,* at page 680 of the opinion, says:

> "An intentional *or reckless omission* to exercise care to ascertain the boundaries of his victim's land or rights, for the purpose of maintaining ignorance regarding them, *or a reckless disregard* of them, *is as fatal* to the claim of a trespasser to limit the recovering of damages against him to the lower measure *as an intentional and willful trespass.*"

In *Pan Coal Co.* v. *Garland Pocahontas Coal Co.*, 97 W. Va. 368, 125 S. E. 226, a leading West Virginia case on this point, the court *holds*:

> "*Syl. 9*: In an action for the recovery of the value of coal mined by a trespasser, the damages therefor are *compensatory only,* whether the trespass be innocent or willful. The disallowance of labor and expense in case of willful trespass, is not based on the ground of allowing plaintiff *exemplary* or *punitive* damages, but on the principle that one who willfully commits a wrong is not entitled to profit thereby while the *innocent* trespasser, *who in good faith* has improved the property has acquired a certain right in it, and is entitled to credit for the value added thereto at his expense, whenever the plaintiff asserts his rights to the property."

In *American Sand & Gravel Co.* v. *Spencer,* 103 N. E. 426 (Ind. 1913) after finding the trespass in question to have been committed knowingly, willfully or recklessly

and awarding damages at the market value after conversion, the court *says*:

> "(9) Appellant insists that the trial court evidently assessed exemplary damages against it, and that in so doing the court erred. A sum assessed as exemplary damages is a sum in addition to compensatory damages. The amount of *compensatory damages in a given case is determined by recourse to rules of law for measuring damages,* while the amount of exemplary damages, where such damages may be assessed, rests in the sound discretion of the jury, guided by proper instructions given by the court, or in the sound discretion of the court, where the court tries the facts. It is evident, from what we have said, that *we have considered the question of the amount of the judgment in the case only from the standpoint of compensatory damages.*"

North Jellico Coal Co. v. *Helton,* 187 Ky. 394, 219 S. W. 185, an early Kentucky case on this point, *holds*:

> "*Syl. 4*: Where coal is taken from another's land, and the trespass is willful, and not the result of an honest mistake, the measure of damages is the value of the coal mined at the time and place of its severance, without deducting the expense of severing it."

In *Griffith* v. *Clark,* 212 Ky. 498, 279 S. W. 971, section 4 of the opinion, the court, in citing with approval the excerpt above quoted from *Liberty Bell Gold Mining Co.* v. *Smuggler-Union Mining Co., says*:

> "One is presumed to have intended the reasonable and natural consequences of his acts, and his denial of such intention is not conclusive, if the act was done *recklessly* OR *wantonly,* or under circumstances warranting a different conclusion. It is rarely possible to contradict an affirmed intention otherwise than by the actions of the party, and such actions, where not reasonably consistent with the affirmed intention, are

always admissible to contradict it in any character of action."

In *John's Run Coal Co.* v. *Little Fork Coal,* 3 S. W. (2d) 623, 223 Ky. 230, Judge *Willis,* in subdivisions (6-8) of the opinion, states the Kentucky rule thus:

> "The rule prevails in this state that where one trespasses upon the lands of another and takes his property, he is liable in damages therefor. The measure of damages, if the trespass is intentional, *and without claim or color of right made honestly and in good faith,* is the market value of the mineral mined, without any allowance for the expense of mining."

Jim Thompson Coal Co. v. *Dentzell,* 216 Ky. 160, 287 S. W. 548, *holds*:

> "*Syl. 1*: Where mineral in place is willfully mined and removed without knowledge or consent of owner, his measure of damage is market value at place where it was taken without reduction for cost of mining."

In the case of *Elkhorn-Hazard Coal Co. et al.* v. *Kentucky River Coal Corporation,* 20 Fed. (2d) 67 (C. C. A. 6th Ct.—Ky. 1927) appellants had entered upon and mined approximately 6,000 tons of coal from appellee's tract of land in Letcher County, Kentucky, in reliance upon a written offer of lease, manually delivered by the president of the appellee to an officer of appellant, and the written acceptance thereof duly deposited in the mail by appellants and addressed to appellee at Lexington, accepting said offer of lease. The president of Kentucky River Coal Corporation testified that his company had never received the alleged U. S. post acceptance of the offer of lease. Appellee contended that even though said acceptance had been mailed, since the past had been se-

lected by appellants and not by appellee as the agent for transmitting the written acceptance of appellant's manually delivered offer of lease, it was incumbent upon appellant to prove the delivery of said acceptance to appellee, and that even though said acceptance on behalf of appellants had been received by appellee, the executory agreement for lease on the lands trespassed upon was not assignable by the corporate appellant to its co-appellants, Pursifull and Gorman, by reason of the fact that under appellee's standard form of coal lease, which was well known to all the appellants, the leasehold evidenced by the executory contract of lease was not assignable, save with the written consent of appellee which was neither given nor sought by any of the appellants. Notwithstanding the ameliorating circumstances otherwise, the court sustained each and all of the contentions of the appellee, and gave judgment against appellants for approximately $1.65 per ton for the coal mined by them from appellee's land, that price being the f. o. b. price at which the testimony showed said coal was sold by appellants.

Says Judge *Westenhaver,* district judge, sitting with circuit judges *Denison* and *Moorman,* in sections (9-11) of the court's opinion in the *Elkhorn Hazard* case:

> "The Court below was right in holding the trespass was not innocent or inadvertent or unintentional. If the trespass is wrongful, nothing else appearing, it will be presumed to be willful. The *duty is cast upon the trespasser* to explain his conduct and to *show* it was inadvertent or unintentional or under a bona fide belief of right. See Resurrection Gold Mining Co. v. Fortune Gold Mining Co. (8 C. C. A.) 129 F. 668, 669; Liberty Bell Gold Mining Co. v. Smuggler-

> Union Mining Co. (8 C. C. A.) 203 F. 795, 802; Central Coal & Coke Co. v. Penny (8 C. C. A.) 173 F. 340, 344. . . . Appellants, including Gorman and Pursifull, were not acting under any mistake of fact, which, if they believed to be true, *might* induce *a good faith belief* that they had a right to take possession and remove coal. *No good faith effort was made to assure themselves that they had such a right.*"

As in *Pan Coal Co.* v. *Garland Pocahontas Coal Co., American Sand & Gravel Co.* v. *Spencer, Jim Thompson* v. *Dentzell, and Elkhorn-Hazard Coal Co.* v. *Kentucky River Coal Corp., supra,* so in the case at bar, the question of what is or is not compensatory damages is determined by recourse to the Kentucky and analogous federal court cases and established rules for measuring damages; and under such rules, upon the facts of the instant case the value of the coal when loaded on cars in the final act of its conversion is no more than compensatory damages; and being *compensatory,* not punitive, such damages are awardable by a court of equity no less than by a court of law.

Nowhere is this question found discussed with more clarity than in *Trustees of Dartmouth College* v. *International Paper Co.,* 132 Fed. 92, 95, where the late Judge *Lowell* expounds the underlying philosophy of the rule thus:

> "If the defendant's admitted conversion was the result of inadvertence or mistake, it is liable only for stumpage, or at most for the value of the logs immediately after their cutting. If the conversion was willful, the defendant is liable for the value of the goods, however improved. . . . The distinction between the two measures of damages is spoken of in

some opinions as one between damages compensatory and damages exemplary. The second measure is sometimes described as if imposed by way of punishment. . . . *But the analogy is misleading,* as appears from this consideration, among others: The second measure of damages is imposed only where the property converted has been enhanced in value. The defendant's bad faith would be the same had the logs been burned, or converted into pulp, and exemplary damages would be the same in both cases; but in the former case no more than their value before burning could be recovered in this action. From one point of view, indeed, the higher measure of damages gives no more than compensation. If the wrongdoer's improvements belong to the original owner, the latter gets no more than compensation when their value is awarded to him. As between the two measures of damages, *the choice depends upon the plaintiff's unqualified ownership* of the property as improved by the defendant's labor. *If this unqualified ownership exists, the higher measure of damages gives no more than compensation for a legal wrong.* If the defendant, by his labor, has gained a right of property in the goods he has converted, the damages should be computed by a lower measure."

None of the Kentucky cases hereinbefore or hereinafter cited have been modified, limited or restricted by the Court of Appeals of Kentucky.

POINT III.

Both the District and Circuit Court Disregarded the Rule of Law in Kentucky that One Who Trespasses upon Land of Another Must, in Order to avail Himself of an Estoppel, Both Allege and Prove Facts Relied Upon as Constituting Such Estoppel, and Disregarded, Also, Certain Fact-controlled Decisions of This Court.

Out of deference to brevity the Court is respectfully referred to pages 14-16 of petitioner's Petition for Rehearing of the cause by the Circuit Court of Appeals (Tr.

Vol. III, pp. 148-150) for excerpts from the opinion of that court, and to the "Appendix" to such petition (*Idem*, 153-169) for excerpts from the opinions of both the District and Circuit Courts, which serve to demonstrate that both courts cast their conclusion (that the trespass was of the "excusable" type) upon the theory that petitioner estopped itself in some way from claiming damages on the basis of a *willed* and *intended* trespass. The *evidence* on this score (being all such), reviewed at some length in said "Appendix", will be found to justify no such conclusion. But granted, *arguendo*, that it *does* do so: Under the controlling Kentucky cases (found cited in said "Appendix"), having neither alleged nor proved facts constituting an estoppel (indeed, not having so much as even indirectly raised the point in its briefs and arguments, in either the District or the Circuit Court; the question having been raised for the first time upon the court's own motion) respondent may not avail itself of the principle and incidents of an equitable estoppel as mitigating the damages awardable petitioner for a trespass presumed by the law of Kentucky to have been intentional, and conclusively shown to have been predetermined upon by respondent.

The obligation of respondent both to allege and prove the facts relied upon as estopping petitioner from claiming the higher measure of damages is a part of the substantive right vouched-safe petitioner by the case law of Kentucky, and guaranteed to it by the Federal Constitution.

Erie Railroad Co. v. *Tompkins, supra.*
Cities Service Oil Co. v. *Dunlap, Supra.*

See also, on the question of what is and what is not an estoppel, *Brant* v. *Va. Coal & Iron Co.*, 93 U. S. 326, 337,

where this Court, speaking through *Mr. Justice Fields, said*:

> "It is also essential for its (an estoppel's) application with respect to the title of real property that the party claiming to have been *influenced by* the conduct or declarations of another to his injury *was himself not only destitute of knowledge* of the true state of the title, *but also of any convenient and available means of acquiring such knowledge.* Where the condition of the title is known to both parties, or *both* have the *same means of ascertaining the truth, there can be no estoppel.* Crest v. Jack, 3 Watts, 240; Knouff v. Thompson, 4 Harris, 361." (Italics supplied);

and *Crary* v. *Dye,* 208 U. S. 515, 521, where this Court, speaking through *Mr. Justice McKenna,* somewhat more appositely said:

> "2. The principle of estoppel is well settled. It precludes a person from denying what he has said or the implication from his *silence* or *conduct upon which another has acted.* There must, however, be some intended deception in the conduct or declarations, or such gross negligence as to amount to constructive fraud. Brant v. Virginia Coal & Iron Co., 93 U. S. 326; Hobbs v. McLean, 117 U. S. 567. And in respect to the title of real property the party claiming to have been influenced by the conduct or declarations must have not only been *destitute* of *knowledge* of the *true state of the title,* but *also* of any *convenient and available means of acquiring knowledge.* Where the condition of the title is known to both parties, *or have the same means of ascertaining the truth,* there can be no estoppel. Brant v. Virginia Coal & Iron Co., supra." (Italics supplied).

The Court will find that *Crary* v. *Dye* deals with a situation peculiarly like that disclosed upon the record of the case in suit and colorfully demonstrates that the way

out for the transgressor *via* an estoppel *in pais* is hard indeed.

POINT IV.

Both the District and Circuit Court Erred in Failing Properly to Apply the Principle of Corporate Knowledge.

The authorities uniformly hold that a trespass on the lands of another is a legal wrong regardless of knowledge, motive or intent of the trespasser. This rule no doubt has its basis in the public necessity for protecting the rights of property and relieving the courts from the necessity for inquiring into the intentions, purposes, or mental condition of the trespasser. A trespass upon land, accompanied by the converting into personalty of a portion of the land, such as timber or coal, and carrying it off, is presumed to be willful. In such case the owner, of course, has the right to retake his own property or recover it in an action of replevin. If the trespasser has parted with possession of the property, the owner has a right of action in conversion, and the measure of his damages is the value of the severed property at the time of its ultimate appropriation. This is not punitive damages in any sense, but merely the value to the owner of his own property (See opinion of *Judge Lowell* in the *Dartmouth College*, the *Pan Coal Company* and the *American Sand & Gravel* cases, *supra*). However, in mitigation of the severity of this rule, in case of an innocent trespass the measure of damages is stated to be the value of the property before severance.

Heretofore we have argued this case on the same premises that were adopted by the District and Circuit Court (and by the Special Master, for that matter, in reaching his contra conclusion, as if the decision of the

question whether the trespass was innocent or whether willful, wanton or reckless, is to be determined by the knowledge and state of mind of the individual who happened to be the president of the defendant company, Mr. M. S. Dudley. However, we submit that that is not the proper method of approach. The state of mind of Mr. Dudley, the individual, cannot determine the question of corporate knowledge, simply by reason of the fact that he held the office of president. Another individual might have been president of the defendant company and have had no hand whatever in the transaction.

The Court is not advised by any production of the charter or by-laws of the defendant company that its Board of Directors even attempted to limit control and responsibility respecting its property to its president or to Mr. Dudley as an individual. As a matter of fact, its Vice-President and Engineer, G. Turner Howard, and also its agent, Bird Holiday, and no doubt others, took part in its operations and business and had custody of and access to its deeds and records. It is difficult to perceive how a trespassing corporation can overcome the presumption of willful trespass, so as to reduce the damages, when it, as a corporation, had at all times among its records title deeds showing the actual location and lines of its own and adjoining properties. And even if every single officer of the corporation should swear that he had no knowledge, and if that could be believed, we submit that this does not constitute proof of corporate ignorance and innocence.

Surely a trespassing corporation does not overcome the presumption of willful trespass by proving that some particular one of its numerous officers, engineers and

agents lacked knowledge, or had for the moment forgotten and acted under a momentary mistake of fact. To do so it certainly must go to the extent of proving that *none* of its officers, engineers or responsible agents *had ever* had knowledge, and that for the lack of such knowledge the corporate action was taken in an excusable because affirmatively well-founded mistake of fact. No attempt was made by defendant to establish such corporate innocence in this case. The record shows that the District Judge and Circuit Court of Appeals no less than the Respondent relied solely on Dudley's statement regarding his own immediate state of mind.

Here again do we respectfully refer the Court to our Petition for Re-hearing by the Circuit Court (Tr. Vol. III, commencing near bot. of page 144) for a somewhat fuller discussion of "corporate knowledge", and its incidents in the law of trespass, to which the foregoing is by way of a prelude condensed from petitioner's therecited "Typewritten Reply Brief", and for a summary of but a small part of the evidence that constitutes the basis of our argument.

POINT V.

Under the Circumstances Obtaining, the Circuit Court Should have Given the Findings of the Special Master Presumptive Effect Over the Contra Findings of the Trial Judge.

The presumptive effect that is given by appellate courts to the Chancellor's findings of fact has its basis in the circumstance that it has observed and heard the witnesses testify and, therefore, is in a favorable position to judge of their credibility; and so in the case of the findings of a special master. From this derives the salutary rule that ordinarily concurrent findings of master

and chancellor should not be and are not set aside except for clear error.

Cleveland Trust Co. v. *Schriber-Schroth Co.*, 92 F. (2d) 330 (C. C. A. 6th Ct); *Atherton v. Anderson*, 86 F. (2d) 518 (C. C. A. 6th Ct.).

In *Tilghman v. Proctor*, 125 U. S. 136, this Court *said*:

> "The conclusions of the master, depending upon the weighing of conflicting testimony, have every reasonable presumption in their favor, and are not to be set aside or modified unless there clearly appears to have been error or mistake on his part."

In *Adamson* v. *Gilliland*, 242 U. S. 350, at page 353, the rule was stated by this Court as follows:

> "So far as the finding of the master or *judge who saw the witnesses* 'depends upon conflicting testimony, or upon the credibility of witnesses, or so far as there is any testimony consistent with the finding, it must be treated as unassailable.' *Davis* v. *Schwartz*, 155 U. S. 631, 15 S. Ct. 237, 39 L. Ed. 289, 291".

In *Lake Erie & Western Railroad Co.* v. *Fremont*, 92 F. 721, 731 (C. C. A. 6th Ct.) the court, speaking through Circuit Judge *Taft*, used the following language:

> "The witnesses came before the master. He . . . had a much better opportunity than the court below or this court to judge of the weight to be accorded to the evidence of each witness. It is a settled rule in the federal courts that, in dealing with exceptions to a master's report, the conclusions of the master, depending upon conflicting testimony, have every reasonable presumption in their favor."

In *Brislin* v. *Killana Holding Corporation*, 85 F. (2d) 667, 669 (C. C. A. 2nd Ct.), the court, by Circuit Judge *Swan, says*:

"The issues turn on conflicting testimony where credibility must be the determining factor. Under such circumstances it is axiomatic that an appellate court will not reverse the findings of judge or *master who heard and saw the witnesses* unless the error is *clear beyond dispute.*"

But what presumptive effect shall be accorded the findings of fact of the special master who heard and observed each of the witnesses testify, and had for many years known nearly all and who himself interrogated several of them on the most controversial fact (the quality of the trespass), where, as in the instant case, the Chancellor, who enjoyed none of these opportunities to judge their credibility, makes findings of this one material and essential fact exactly contrary to that of the Special Master?

This precise query is answered in *Roberts* v. *Southern Surety Co.*, 33 F. (2d) 501 (C. C. A.—N. C.), which *holds*:

"*Syl. 1*: Where the findings of special master were reversed by trial judge, Circuit Court of Appeals is *under duty to examine evidence and determine facts for itself giving due weight to findings of master who saw witnesses*:"

Says Circuit Judge *Northcott* in the *Roberts* case, in first reviewing and then applying the holdings of the Federal Courts, both District and Circuit, on this question:

"Findings of fact by a master may not be set aside, in the absence of convincing evidence to the contrary. *Curtice Brothers Co.* v. *Barnard* (C. C. A.) 209 F. 589.

"The finding of a tribunal, whether it be a master, a referee, or a judge, who sees and hears the witnesses and is in the environment of an oral hearing,

is entitled to great weight, and great caution should be exercised by any tribunal having the authority, or being under the duty to review such finding, in disturbing it. *Fernarld Woodward Co.* v. *Conway Co.,* (D. C.) 229 F. 819.

"Where there is a real or apparent conflict between findings of master and those of trial court, appellate court has duty to examine evidence and determine facts for itself. *Armstrong* v. *Lone Star Refining Co.* (C. C. A.) 20 F. (2d) 625.

"That the master, whose findings were set aside by the trial court, heard and saw the witness who testified, cannot be disregarded on appeal from *the decree entered by the court* on *its* findings. *Dorrance* v. *Dorrance* (C. C. A.) 264 F. 54, certiorari denied 254 U. S. 654.

"In the instant case it would, therefore, seem to be the duty of this court to examine the evidence offered and determine the facts for itself, bearing in mind the proposition above laid down, to wit: That the master whose findings were set aside, heard and saw the witnesses who testified, and his conclusion cannot be disregarded on appeal."

Says Circuit Judge *Kohlsaat,* in writing the opinion of the court in *Curtice Brothers Co.* v. *Barnard, supra*:

"The voluminous record of this case deals largely with . . . . a question of fact. The finding of fact of the master may not, in the absence of convincing evidence to the contrary, be set aside. *To show that the report is erroneous and not justified by the evidence, the burden rests upor the appellant."* (Appellee in the instant case).

And what of the situation where, as in the instant case, the order of reference to the special master expressly stipulates that—

"The findings which he shall make shall not be final or given any presumptive effect, but the ques-

tion as to all such shall be open for determination by the Court as if no findings had been made"?

Nowhere have we found this proposition so clearly stated and so convincingly answered as in *Atherton* v. *Anderson, supra,* where the Court, speaking through Circuit Judge *Simons, says*:

> "It is urged, however, that since the order of reference recited that the report of the master was to be advisory only, little weight need be given his findings. To what extent this weakens the presumption of correctness that attaches to them would be difficult to say. Certainly the court must even in such circumstances consider the superior opportunities of the master who heard and saw the witnesses to appraise their credibility and to harmonize conflicting testimony. In practical application perhaps there is little difference between saying the master is presumptively correct and saying that his findings are purely advisory, especially when as here the master is specially selected for exceptional ability to aid the court in a peculiarly complicated and difficult case. His advice is not lightly to be rejected, whatever the formula."

Thus does it appear that the fallibility, or not, of the master's findings is to be tested not by would-be limitations imposed by the order of reference upon the presumptive effect to be given such findings, but by the practical likelihood that his findings are correct or incorrect. In the instant case the master, prior to his elevation to the Clerkship of the Circuit Court of Appeals of the Sixth Circuit, had for twenty-eight years been the Clerk of that emminent mountain-land lawyer and jurist's, District Judge Cochran's Court and had served as special master for Judge Cochran in more than a score of cases. Throughout that time he had been personally acquainted

with practically every person who had a part in the making of the record in this case, whether as litigant, attorney or witness, and during the numerous hearings before him had every opportunity to evaluate their testimony, and where any such was doubted to judge of the witness' credibility. To supplant his findings as to the one controlling fact of the case (the *quality* of the trespass, whether willful and inexcusable or unintentional and excusable) for the contra finding of the newly appointed low-land district judge, arrived at from the mere reading of the testimony of witnesses whom he did not know and had not heard testify, either in this or any other case, because of the "formula" prescribed by the order of reference, is, we earnestly urge, but to put the shadow above the substance of things real.

The cases thus far cited on this point serve to show that the decisions of the Circuit Court of Appeals of the several judicial circuits, ruled, as they were, upon a variety of facts and circumstances, are not in accord as to the effect to be given the findings of the Special Master under the peculiar circumstances that obtain in this case. *Compare*, also:

Vann v. *Almours Securities,* 96 F. 2d 214 (C. C. A. 5th Ct.)

Stearns v. *Central Petroleum Co.,* 93 F. 2d 638 (C. C. A. 10th Ct.)

Wilson-Western Sporting Goods Co. v. *Barnhart,* 81 F. 2d 108 (C. C. A. 9th Ct.)

In Re: *Turley,* 92 F. 2d 944 (C. C. A. 7th Ct.)

Nor has this Honorable Court directly ruled upon the point when so circumstanced: a fact, we submit, which calls for an exercise of the Court's discretion to review the decisions of the District and Circuit Court of Appeals,

and elicits its general power of supervision over those decisions.

POINT VI.

Respondent's Motive and Purpose in Mining Coal from Petitioner's Land, and its Liability Therefor, stem from its Lease to its Lessee, Knott Coal Corporation.

In its opinion (Tr. Vol. III, p. 131) the Circuit Court of Appeals said:

> "Whatever may have been the subsequent relations between appellant and appellee, and between the appellee and its lessee, and whatever the inferences now sought to be drawn from the long series of negotiations, communications and maps, any determination of the quality of the trespass as willful and prompted by a deliberate purpose of the appellee that its lessee should appropriate the appellant's coal to its profit of 10 cents a ton royalty, must stem from the lease to the Knott Coal Corporation, and the circumstances under which it was executed."

That a lessor who includes in a coal lease to his lessee a tract of coal land owned by another is liable, jointly with his lessee, for coal mined and removed by his lessee therefrom, is the holding of the Court of Appeals of Kentucky and of the courts of last resort of numerous other states. In the determination of this joint liability the legal relationship between lessor and lessee is deemed to be that which obtains between principal and agent. The doctrine has its foundation in the principle that the lessor, having authorized, encouraged and procured the acts constituting the trespass to be committed by its lessee, thereby making its lessee its own agent, becomes bound as principal for all damage resulting from the execution of the agent's undertaking, and as such must respond under the rule of *respondeat superior*.

An early case from other jurisdictions in which the doctrine obtains, and one frequently referred to in the later cases arising in Kentucky and other states, is *Donovan* v. *Consolidated Coal Co.*, 187 Ill. 28, 58 N. E. 290, 29 Am. St. Rep. 206. We quote the pertinent *syllabus* of the case as follows:

> "*Syl. 1*: One who knowingly authorizes a company to mine for the coal of a third person, and the company takes it and pays him therefor, is liable as a trespasser, *though he did not participate in mining the coal otherwise than by making the contract under which it was dug.*"

One of the best considered Kentucky cases in which this doctrine has been applied is *Blackberry, Kentucky-West Virginia Coal Co.* v. *Kentland Coal & Coke Co.*, 225 Ky. 346, 8 S. W. (2d) 425, where the court *held*:

> "*Syl. 5*: Where landowners erroneously included in their lease for mining purposes 80 acres of land belonging to another, and the lessee, in ignorance of this fact, mined such lands, *held,* in action for recovery for trespass, that such lessors of the 80 acres were liable to the real owners thereof for *having contributed* to the lessee's trespass, although lessors were innocent of willfully leasing lands of another."

Another leading Kentucky case on this doctrine is *Thompson et al.* v. *Dentzell et al.*, 232 Ky. 755, 24 S. W. (2d) 607 (which is a later edition of *Jim Thompson Coal Co.* v. *Dentzell,* 216, Ky. 160, 287 S. W. 548) in which the court *held*:

> "*Syl. 2*: In suit to enjoin trespassing and mining coal upon complainant's land, where offending company, as lessee, was induced to trespass by misrepresentations on part of lessor's agent, both lessor and agent, as well as company itself, are responsible for coal mined."

The doctrine is enunciated nowhere quite so clearly as in *Kentucky Harlan* v. *Harlan Gas Coal Co.,* 245 Ky. 234 (1932) 53 S. W. (2d) 538, where the Court of Appeals of Kentucky, speaking through *Richardson,* Judge, in the closing paragraph of 10-12, of the opinion, states the principle involved thus:

> A lessor who by his lease *vests the right or privilege* in a *lessee* to mine or cut timber on land covered by his lease, reserving in himself the right to a royalty, or a portion of the proceeds, occupies a different position in relation to a trespass committed by the lessee on adjoining lands in virtue of a lease from that of a *grantor* who by his deed *vests the title in fee* in his *vendee* and thereby severs absolutely all his interests, right, and title in the property conveyed. *Under such lease there exists and continues between the lessor and lessee or his assignee, during the life of the lease, the relations of principal and agent,* and, if the lessee or his assignee commits a trespass on adjoining land in the execution of the lease, he is deemed the agent of the lessor in its commission, and the law implies that, in the commission of the trespass, the lessee, or his assignee, by virtue of the lease, was *authorized, encouraged,* and *procured by the lessor* to commit it. It is on this theory that the lessor in such case is liable for trespass committed by the lessee or his assignee on adjoining lands, when executing or carrying out the provisions of the lease.'' (Italics supplied).

The latest Kentucky case in which this doctrine is given even fuller consideration and acceptance is *Davis* v. *Kentland Coal & Coke Co.,* 247 Ky. 642, 57 S. W. (2d) 542, which is a re-appearance of *Blackberry, Kentucky* v. *Kentland, supra,* for the adjudication of matters left undetermined in the former appearance of the case in the Court of Appeals of Kentucky. This particular appeal was

prosecuted by Chloe A. Davis (or Hatfield) and eleven others, as joint lessors of the tract in question to the Blackberry-Kentucky Company: appellants seeking to be relieved from paying a judgment that had been awarded Kentland Coal Company against them and their lessee and sub-lessee, jointly, upon the theory that they should not be held liable in damages at the rate of twelve cents per ton (which the court in Blackberry, Kentucky v. Kentland, *supra,* found to be the value of the coal in place and the measure of damages for its inadvertent conversion) or at any other rate in excess of the seven (7) cents per ton royalty provided to be paid them under the terms of their original lease to the Blackberry-Kentucky Company. Suffice it to say that on this appeal the court upheld the judgment of twelve and one-half cents per ton as against Chloe Davis and her eleven co-lessors; and on the question generally of their joint liability with their lessee and sub-lessee the court *held*:

> *Syl. 1*: Lessors were liable on the theory that the relation of *principal and agent* was in a sense, by the terms of the lease, created; and, if their lessee or sub-lessee committed the trespass in the execution of th lease, it must be presumed that they were *acting for the lessors* in its commission, and therefore the law implied that, in the commission of the trespass, the sub-lessee, by virtue of the lease, was *authorized, encouraged,* and *procured by the lessors* to commit it."

We submit that under this Kentucky rule respondent's coal lease to Knott Coal Corporation, dated March 15, 1921, five and a half years before the trespass was inaugurated (see *Lease,* Item 32 of "Binder A" of "Original Papers"), and the letter from respondent's president, *Dudley,* to Knott Coal Corporation's president, *Hugh L.*

Buford, dated June 4, 1929, reciting "the circumstances under which it (the lease) was executed" (see Letter, page 22 supra) leave nothing to inference, but on the other hand conclusively show that the respondent knowingly included petitioner's 100-acre tract in said lease with the deliberate purpose of procuring its lessee, Knott Coal Corporation, to mine and remove the coal underlying petitioner's land for respondent's own account.

POINT VII.

The Circuit Court Has Misconceived the Use and Application Made by Petitioner of the So-called Kentucky Double Liability Statute.

This Statute (*Carroll's Kentucky Statutes,* Sect. 1244 (a)-1, which became operative on June 21, 1928) is set out *in extensio* at page 32 supra. It has never been construed by the Kentucky Court of Appeals.

The evidence shows that of the 113,680 net tons of coal agreed upon as having been mined from petitioner's land (Tr. Vol. II, p. 245), only 23,433 tons were mined after the statute became operative. The court's interpretation of the statute, and its application of the statute to the coal mined after the statute became effective, while pertinent to a determination of the merits of the case, is not deemed pertinent to our immediate contention that the Circuit Court erred in holding that "it is upon this statute that the plaintiff (petitioner) mainly relies" in the assertion of its claim for basic compensatory damages in the amount of the f. o. b. value of the entire 113,680 tons of coal which respondent procured its lessee to mine and remove from petitioner's tract of land.

Once again do we beg leave to refer the Court to our Petition for Rehearing of the cause by the Circuit Court of Appeals (Tr. Vol. III, from mid. of p. 140 to bot. of

p. 144) for a full discussion of this Double Liability Statute, and of the Circuit Court's misconception of the use and application which petitioner made of it in contending for basic compensatory damages in the amount of the f. o. b. value of said 113,680 tons of its coal, which was none at all.

POINT VIII.

The Federal Constitution Guarantees Petitioner the Right to Have its Claim for Damages Determined by the Law of Kentucky; And this Court will Make Its Own Examination of the Facts in Determining whether the Circuit Court of Appeals has Denied that Right to Petitioner.

The lower federal courts cannot avoid the obligation to enforce the rule of Kentucky law that the price at the tipple is the measure of damages for a willful trespass, by deciding, contrary to the evidence, that the trespass was innocent. This Court, in order to ensure the application of the rule of *Erie R. Co.* v. *Tompkins,* and restrain the lower federal courts from invading rights which are reserved by the Constitution to the several States, will determine for itself which branch of the Kentucky rule of damages the evidence required to be applied. If the lower federal courts were free to apply the proper rule of Kentucky law or not, merely by announcing conclusions which the evidence does not justify, the application of Erie R. Co. v. Tompkins could be avoided, and the jurisdiction of this Court eluded, by arbitrary findings of fact.

The principle to be applied is analogous to that announced in *Harris* v. *Balk,* 198 U. S. 215, and *American Express Co.* v. *Mullins,* 212 U. S. 311. In the latter case this court determined for itself whether there was anything in the record which relieved the trial court from

the duty of enforcing the full faith and credit clause of the Constitution. The same principle has been frequently expressed in numerous cases where state legislation was asserted to have impaired the obligation of contracts. *Mobile & Ohio R. R.* v. *Tennessee,* 153 U. S. 486; *Terre Haute and Indianapolis R. R. Co.* v. *Indiana,* 194 U. S. 579; *Ward* v. *Love County,* 253 U. S. 17; *Columbia Ry.* v. *South Carolina,* 261 U. S. 236.

It is manifest that where this Court is required to determine whether a lower court has enforced the proper rule of the law of the State, it is frequently necessary that this Court must make its own independent examination of the facts, in order to determine what rule of State law should have been applied by the lower court.

WHEREFORE, your petitioner respectfully prays that a writ of certiorari be issued out of and under the seal of this Honorable Court, directed to the United States Circuit Court of Appeals for the Sixth Circuit, commanding that Court to certify and send to this Court, for its review and determination on a day certain to be therein named, a full and complete transcript of the record and all proceedings in the case numbered and entitled on its docket, *Number 8142, Kycoga Land Company, a corporation, Appellant,* v. *Kentucky River Coal Corporation, a corporation, Appellee,* and that the said decree of the Circuit Court of Appeals for the Sixth Circuit rendered in said case may be reversed by this Honorable Court, and that your petitioner may have such other and further relief or remedy in the premises as to this Honorable Court

may seem meet and just; and your petitioner will ever pray.

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